Office-Supreme Court, U.S.
FILED
MAR 27 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1633

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

McARTHUR DAVIS,

Petitioner,

vs.

FLORIDA EAST COAST RAILWAY COMPANY,

Respondent

Petition for Writ of Certiorari to the District Court of Appeal First District, State of Florida

---

TOM B. STEWART, JR.
345 East Forsyth Street
Jacksonville, Florida 32202
Telephone No. 904-353-6473

Counsel of Record for Petitioner

WILLIAM D. BARFIELD
401 Florida Theatre Building
Jacksonville, Florida 32202

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Petitioner was engaged in switching operations making up a train. In connection therewith a coupling was to be made between two cars. On one of the cars the coupler was so far out of line that it would not couple automatically with the other car upon impact. Because of this it was necessary for him to manually align the drawbar to a more central position so the coupling could be made and, while doing this, he suffered the injuries for which recovery was sought.

The Question is:

1. Whether the employee was entitled to jury instructions that the operation of a car on which the drawbar is so far out of line as to prevent automatic coupling violates the Safety Appliance Act and imposes absolute liability for the employee's injury.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINION BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2, 3

STATEMENT OF THE CASE 3, 4

HOW THE FEDERAL QUESTIONS AROSE 5, 6, 7, 8

REASONS FOR GRANTING THE WRIT 11, 12

ARGUMENT OF COUNSEL 8, 9, 10, 11

ARGUMENT 12, 13, 14, 15, 16, 17

CONCLUSION 19

CERTIFICATE OF SERVICE 20

APPENDIX A:
District Court of Appeal, First District, State of Florida. Judgment and Opinion dated December 30, 1980 ..... A-1

APPENDIX B:
Circuit Court, Duval County, Florida. Charge to jury on Safety Appliance Act B-1-2

TABLE OF AUTHORITIES

Page

Affolder v. New York, C. & St. L. R. Co.,
339 U.S. 96 (1950) 12, 14, 16

Atlantic City Railroad Company v Parker,
242 U.S. 56 (1916) 7, 17, 18

Atlantic City R. R. Co. v. Parker
93 A 574, cert. denied, 242 U.S. 56 (1916) . . . 12, 17

Bailey v. Central Vermont Railway
319 U.S. 350 (1943) 11, 18

Carter v. Atlanta & St. Andrews Bay Ry. Co.,
338 U.S. 430 (1949) 12, 14, 16

Chesapeake and O. Ry. Co. v. Arrington,
101 S.E. 415 (Va., 1919) 7, 17

Chicago, St. P., M. and O. Ry. Co. v. Muldowney
130 F 2nd 971 (8th Cir. 1942)
cert. denied, 317 U.S. 700 17

Kansas City Southern Railway Company v. Cagle,
229 F 2nd (10th Cir. 1955) 12

McGowan v. Denver & R. G. W. R. Co.,
244 P 2nd 628 (1952) cert. denied
344 U.S. 918 (1953) 12, 13

Metcalfe v. Atchison, T. and S. F. Ry. Co.,
491 F 2nd 892 (10th Cir. 1974) 17

O'Donnell v. Elgin, Joliet & Eastern Railway Company
338 U.S. 384 (1949) 12, 14

Tiller v. Atlantic Coast Line R. Co.,
318 U.S. 54 (1943) 18

STATUTES

Federal Safety Appliance Act
49 USC §2 and §7 . . . . . 2, 3

NO.

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1980

McARTHUR DAVIS,

Petitioner,

vs.

FLORIDA EAST COAST RAILWAY COMPANY,

Respondent

Petition for Writ of Certiorari to the District Court of Appeal First District, State of Florida

---

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the District Court of Appeal, First District of the State of Florida, entered December 20, 1980, affirming a judgment for the employer rendered by the Circuit Court of Duval County, Florida, in an action by petitioner under the Federal Safety Appliance Act.

OPINION BELOW

The per curiam opinion of the District Court of Appeal is reported at 292 So.2d 69 by caption and disposition and appears in Appendix A-1.

JURISDICTION

The judgment of the District Court of Appeal, the highest court of Florida in which a decision could be had, Article V, §§ 3 and 4, Florida Constitution was entered December 30, 1980. Jurisdiction of this Court is invoked pursuant to 28 USC 1257 (3).

STATUTES INVOLVED

49 USC §2 and §7 Federal Safety Appliance Act.

§2. Automatic couplers

It shall be unlawful for any common carier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
Mar. 2, 1893, c. 196, §2, 27 Stat. 531.

§7. Assumption of risk by employees.

Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions of sections 1 to 7 of this

title shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.
Mar. 2, 1893, c. 196, §8, 27 Stat. 532.

STATEMENT OF THE CASE

Petitioner was the switchman in a yard train crew consisting of an engineer, a conductor and himself. A number of boxcars from other points in Bowden Yard had been placed end to end on #14 track where they were to be coupled together into a train. Petitioner would walk down the line of cars and when he came to breaks between the cars, if the couplers were in alignment, would signal the engineer to shove the cars forward and effect the automatic coupling by impact.

However, couplers are on the ends of drawbars and have side play which gives flexibility to the train enabling it to traverse curves without derailing. To make side play possible the drawbar rests on a metal plate on which it can slide from side to side. When cars are uncoupled on a curve a drawbar may remain in a side position. Drawbar can also be knocked out of alignment when cars with closed knuckles are shoved together during a switching operations, knocking one or both couplers to a side position where they may stay. In some cases a drawbar may be so far off center as to preclude automatic coupling with another car. In such cases it is necessary for the switchman to "adjust", that is to say, manually move the drawbar to a center position before a coupling can be made. Ordinarily, the alignment of a coupler by the switchman poses no real problem as he either pushes it or

pulls it across the slide plate to the proper position and then signals the engineer to bring the cars together. Sometimes, however, a coupler will be hard to move and must be lifted up from and across the slide plate.

On this occasion petitioner, walking southerly, came upon a car with the drawbar so far out of alignment to the west that it was incapable of coupling with any other car. He tried to push it. It wouldn't move. He then tried to pull it. It still wouldn't move. He secured his footing and when he reached under and attempted to lift it over felt excruciating pain in his back and had to let go. Petitioner estimated the weight of the coupler at 150 to 300 lbs. (R-II-8-82)

T. A. Ryals, (R-II-92) a yard switchman with 28 years experience with the Atlantic Coast Line Railroad, testified that drawbars and couplers weigh between 300 and 350 lbs. Misaligned drawbars occur on every job and ordinarily are no problem as "you either pull or just push it, whichever direction you want it to go." Sometimes they are hard to move and it is necessary for the switchman to "get his hands, or sometimes his arms, underneath it and lift it and shove it at the same time." (R-II-82-94).

The cars were, therefore, equipped with "automatic couplers" in the sense they coupled automatically when in alignment. Some railroad couplers are designed with springs which realign them to a central position when released from other cars, but petitioner made no contention that the railroad was under a present obligation to use any specific type of coupler.

THE FEDERAL QUESTIONS

The federal questions arose at trial in the Circuit Court of Duval County, Florida, when petitioner requested and the Court refused to give the following jury instructions. (R. Petitioner's requested jury instructions.)

Requested instruction No. 1 said:

> Plaintiff, McArthur Davis, alleges in this action that while he was engaged in the performance of his duties as a switchman for the defendant making up a train being used in interstate commerce a coupler on one of the cars was so far out of line that it could not couple automatically by impact with another car, and that it was necessary to manually adjust the alignment of the coupler to a more central position so that a coupling could be made, and while doing this, he suffered the injuries for which recovery is sought.

Requested instruction No. 3 said:

> I charge you that the Safety Appliance Act imposes an an absolute duty upon common carriers engaged in interstate commerce by rail to equip and maintain on all cars used by it, couplers that will couple automatically by impact. Any violation of this duty resulting in injury to an employee gives rise to a liability for damages and the railroad company is not excused by any showing of diligence and due care on its part, however great. It is not only the duty of the railroad to provide such couplers, but to keep

them in such operative condition that they will perform their functions at all times.

Requested instruction No. 5 said:

If you should find that the coupler was so far out of line that it would not couple automatically by impact and if it was necessary for plaintiff to manually adjust the drawbar or coupling mechanism in order to make the couplers couple automatically by impact, then there would be a violation of the Safety Appliance Act by the defendant in not having the type of coupler required by the Act.

"The Court dictated its ruling in the record (R. IV, 403-404) as follows:

THE COURT: You are saying that the couplers fall out of line, and they needed adjustment?

Now, if 5 doesn't cove every possible suggestion in that:

'If you should find that the coupler was so far out of line that it would not couple automatically by impact' --the expert says, no, it won't, and your man says it was all the way over, out of line, by impact, and it was necessary for him to manually adjust the drawbar in order to make it couple automatically by impact, then there's a violation.

MR. STEWART: Yes sir.

THE COURT: Clear, absolute violation, without anything further. There ain't no use to.

> Then, I charge you that they have the equipment and maintain their cause -- either -- already repeated the cause -- the law is that they have got to automatically couple.
>
> I'll deny 3.
>
> Now, let me show you what I've done on yours. I'll deny 1, I'll give 2, I'll deny 3, I'll deny 4, I'll give 5, and I'll deny 6, and I'll deny 7, because I'm giving it in another charge."

The Court denied employer's requested instruction No. 7, which read:

> "7. In considering whether or not the Safety Appliance Act was violated, you are instructed that side play or lateral movement from side to side of couplers and drawheads is necessary in order for cars to round curves and that this side play or lateral movement does not consitute a defect in a coupler unless it is found that the side play or lateral movement is greater than necessary for the safe operation of the cars. (*Atlantic City Railroad Company v. Parker,* 242 U.S. 56, [1916]; *Chesapeake and O. Ry. Co. v. Arrington,* 101 S.E. 415 [Va., 1919])."

Following the conference on the charges the Court was recessed until 9:00 A.M. the following morning. When Court reconvened employer's attorney renewed his objection to requested instruction No. 5 (R-IV-409) contending it was "nothing more than a comment on the evidence, and a rather severe comment on the evidence," that the Court should "just read the statute on the Appliance Act, and let the jury then make its decision" . . . "and I think that in view of the statute which is clear

on its face -- it seems to me that what should be instructed is simply to read the statute, and then let the lawyers make the arguments as to whatever the statute provides, and what the evidence shows as to whether or not there's a violation of the Act." Thereupon, the Court announced "All you got to tell the jury is that if they believe that the car would not couple, then they have violated the Act, and there ain't no fuss and/or buss about it." . . . "Of course, you can comment on that," and "I'm going to deny your requested instruction No. 5, and please note his objection in the record, and in lieu thereof, I'll give requested instruction No. 2, which is the law." (R-IV-412) . . . "the law clearly says that if they have a car that will not couple on impact, it's a violation of the law, and you can comment in your -- in your speech to the jury." . . . "The Court: I know what you want me to say, that it's a violation of the Act. I'll direct a verdict for you if I do that." (R-IV-413)

Petitioner's counsel argued to the jury that if the coupler was so far out of line that it would not couple automatically without adjustment there was a violation of the Act. (R-III-427)

Employer's counsel argued "there was nothing that was inefficient or defective about the coupler." . . . "that couplers must move from side to side," . . . "you can't run a railroad if it don't" . . . "just because one is off to the side, that doesn't mean there's anything wrong with it. You have heard that just because it gets pushed over, that doesn't mean there's anything wrong with it." He further argued that when the law says a coupler must couple automatically it means when they "come together and they lock and nobody has to go in

there and drive a pin in." He further argued that neither the Petitioner nor his witness, Mr. Ryals, could find anything wrong with the coupler, that "just because you have to move one back over to the middle doesn't mean there is something wrong with it." . . . "there's no evidence that this coupler was defective?". And finally "what really was the cause of this accident, if it happened as he says, was that he failed to go and get the help that he was under obligation to do, and he knew he could, and that he had in the past, and that's the cause of the accident." (R-IV-454-456)

The jury retired at 11:00 A.M. and after 15 minutes returned and the foreman stated to the Court that it had a question to ask "we ran into a snag, maybe, to begin with that the -- when you read us the law, which in a sense said that the coupler should couple automatically. We need to know by "automatically -- by what means automatically? Does that mean that the coupler should couple automatically without aid from any human?". The foreman also asked "does it also mean that it must couple automatically without having been touched by any human before?" Answering the questions the Court said: "Listen to the law. I think you will be able to interpret it if you listen to the law." Again the Court read the statute verbatim and returned the jury to its deliberations.

Immediately Petitioner's counsel renewed his request that the Court give his requested instruction No. 5 or a charge that "operating a car on which the drawbar is so far out of line as to prevent automatic coupling violates the act and imposes absolute liability." and the following transpired:

"THE COURT: Well, now, are you saying

that I should have charged them that?

MR. STEWART : I believe that the jury is obviously confused. They didn't get a reply to the question that they asked, and the Courts were a long time arguing what this meant, in that even our Court system in this country had difficulty with the Act until -- until it was interpreted -- interpreted by the appellate courts of the United States, mostly in cases occurring 50 years before now.

THE COURT: You had forty-eight minutes to argue to the jury all of these points that you are now making, and I refused to give that charge. I believe it's your charge No. 4, because I felt that it's too much of a comment on the evidence.

MR. STEWART: Yes. sir. This is a federal case, Your Honor, and there is no prohibition.

THE COURT: I don't care if it's an international case, I still say --

MR. STEWART: I think it's law, Your Honor, for the reason I was -- I argued it, yes, and the jury, obviously, now is wondering whether my argument is valid, or it could just be hot air, because --

THE COURT: That's your interpretation of it, I don't interpret that at all, but your objection is noted in the file.

MR. STEWART: All right, sir." (R-IV-481)

At 2:30 P.M. the jury returned to advise the Court it had reached an "impasse" and asked "if we were to award for the plaintiff, does it make the defendant guilty and in violation of federal law" and the Court inquired:

"THE COURT: You mean from a criminal standpoint? To get them to a criminal prosecution?

Come to the side-bar gentlemen.

Is that what you mean?

MR. HAYES: Yes. sir. I guess I really meant to both. Both for the -- both liable for future -- will it make the railroad liable for future or present liability?

THE COURT: You can't award for the Plaintiff unless the defendant has violated the Safety Appliance Law.

MR. HAYES: That is all we needed to know then.

THE COURT: We are not convicting them." (R-IV-484-485)

The jury again retired and at 3:25 P.M. returned to the courtroom with a verdict for defendant. (R-IV-486)

The portion of the Court's charge given on the Safety Appliance Act appears Appendex B-1-2.

The refusual of the Trial Court to give petitioner's requested instructions Nos. 1, 3 and 5 were designated as judicial acts to be reviewed in the District Court of Appeal (R-I - 31).

REASONS FOR GRANTING THE WRIT

The decision of the District Court of Appeal sustaining the rulings of the trial court deprived petitioner of the protective provisions of his Federally created rights under the Safety Appliance Act, as interpreted in the Federal Courts. *Bailey v. Central Vermont Railway,* 319 US 350 (1943).

A. The decision is in direct conflict with the

decision of the United States Court of Appeals, Tenth Circuit, in *Kansas City Southern Railway Company v. Cagle,* 229 F 2nd (10th Cir. 1955), and is in direct conflict with the decision of the Supreme Court of Utah in *McGowan v. Denver & R. G. W. R. Co.,* 224 P 2nd 628 (1952), certiorari denied, 344 US 918 (1953).

B. The decision is in substantial conflict and inconsistent with the construction of the Act by numerous cases decided by the Supreme Court of the United States including *O'Donnell vs Elgin, Joliet & Eastern Railway Company,* 338 US 384 (1949), *Carter v. Atlanta & St. Andrews Bay Ry. Co.,* 339 US 430 (1949), and *Affolder v. New York, C. & St. L. R. Co.,* 339 US 96 (1950).

C. The District Court of Appeal, First District, State of Florida has decided an important question of Federal law construing and affecting the rights of railroad employees which has not been settled, but should be settled by this Court. *Atlantic City R. R. Co. v. Parker,* 93 A 574, cert. denied, 242 U.S. 56 (1916).

ARGUMENT

In *Cagle*, supra, the Court of Appeals, Tenth Circuit, affirmed a judgment for a railroad employee who suffered an injury in the same way as petitioner in the instant case, saying at 229 F 2nd 14, 15:

> "The one fact upon which appellant was sought to be held liable was that it was operating a car on which the drawbar was so far out of line that it could not be coupled automatically by impact. Appellant states the question in its brief to be, 'Was the one fact

that the coupler was out of line a noncompliance with the Act?' We think the answer to the question must be in the affirmative.

A great number of cases have considered the scope and effect of the Coupler Provision of the Federal Safety Appliance Act. Space prevent even a listing of all the cases which have considered these provisions, let alone an analysis thereof. Without exception they have held that the Act requires that cars be so equipped that they will couple automatically by impact and can be coupled and uncoupled without the necessity of persons going between them. Without exception the cases have held that operating a car on which the drawbar is so far out of line as to prevent automatic coupling violates the Act and imposes absolute liability."

* * *

"The trial court correctly instructed the jury that the only questions of fact were, was the drawbar so far out of alignment as to prevent automatic coupling of the two cars, and were appellant's injuries the proximate result, if the first question was answered in the affirmative?"

In *McGowan,* supra, the Supreme Court of Utah, in affirming a judgment for the employee said at 224 P 2nd 630:

"Plaintiff testified that as the east end of the coal car approached him he noticed that the moving coal car's drawbar was so far out of alignment toward him that without adjustment, it would not couple on impact so he shoved it with his right foot moving it slightly but not

> enough, that he then gave the engineer an unheeded stop signal and shoved the drawbar again still not moving it enough, so he shoved it again this time moving it enough so that it coupled on impact, crushing his toe between the knuckles."

* * *

244 P 2D at 630:

> "Instruction No. 5, states that 'if it was necessary for plantiff to adjust the drawbar or coupling mechanism with his hands or feet' there was a violation of the act."

The Court made an exhaustive review of the law and on the authority of *O'Donnell,* supra, *Carter,* supra, and *Affolder,* supra, at 244 P 2d at 633 held:

> "These cases hold that under the Safety Appliance Act a plaintiff does not have to show a defective or bad condition of the coupler but is entitled to a peremptory instruction that the failure of the coupler to perform properly is a violation of the Act which renders the defendant liable for all injuries proximatley resulting in whole or in part from such failure to perform, which is itself an actionable wrong."

For an excellent discussion of couplers, see n. 2 at 244 P 2d 630.

In *O'Donnell,* supra, the facts were the coupler separated after having been coupled and the car running free was alleged to have collided with other standing cars and drove them against those whose couplers decedent had said he was going to adjust. The Supreme Court at 338 US 389, said:

"We hold that the Safety Appliance Act requires couplers which, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control.

What then should a jury be instructed is the consequence of a failure to provide couplers that so perform? Should the jury be instructed that it must find liability or merely that it may find liability for injuries proximately resulting from the failure?

and at 338 US 390, said:

"But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability - a liability that cannot be escaped by proof of care of diligence. (authorites omitted). These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: 'The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous.'"

and at 338 US 393, said:

"The plaintiff, for example, can add nothing to the liability incurred from a violation of the

> Act by producing evidence of negligence. Here there was affirmative and, so far as we can find, uncontradicted testimony that there was 'a partial fracture on the inside of the coupler,' indicating that the coupler was weakended by an old defect. However important this evidence might have been in determining common law negligence, it added nothing to the direct case under the Safety Appliance Act made by showing the breaking of the coupler.

and at 338 US 934, said:

> "As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care were to be considered on the question of this liability."

In *Carter,* supra, the Court said at 338 US 433:

> "Since 1893 the Congress has made it unlawful for a railroad company such as respondent to use any car on its line 'not equipped with couplers coupling automatically by impact.' This Court has repeatedly attempted to make clear that this is an absolute duty not based upon negligence, and that the absence of a 'defect' cannot aid the railroad if the coupler was properly set and failed to couple

> on the occasion in question. (Authorities omitted). The fact that the coupler functioned properly on other occasions is immaterial."

In *Affolder,* supra, the Court again said at 339 US 98:

> " Respondent took the position that the criterion of the Act is, 'were they (the cars) equipped with efficient couplers?' and 'did they (the couplers) in fact fail to couple?'"
>
> * * *
>
> "Nor do we think that any question regarding the normal efficiency of the couplers is involved in an action under the Safety Appliance Acts." ..."the duty under the Acts is not based on the negligence of the carrier but is an absolute one requiring performance 'on the occasion in question.'"

To the same effect see: *Chicago, St. P., M. and O. Ry. Co., v. Muldownwy* 130 F 2nd 971 (8th Cir. 1942), cert. denied, 317 US 700; and *Metcalfe v Atchison, T. and S. F. Ry. Co.,* 491, F 2nd 892 (10th Cir. 1974).

The employer contended that the Supreme Court of the United States in *Parker*, supra, recognized an exception to the requirement that couplers must always couple automatically where the normal operations of the railroad required sideplay. The employer found support for its position in *Arrington*, supra.

Parker only suggests, by way of dictum, that an argument could be made for such defense, but did not declare it to be the law. *Arrington*, supra gave credence to the exception but held the exception did not apply in

the case under consideration.

The prejudice was made patent when the jury returned after fifteen minutes deliberation to state 'we ran into a snag" over the meaning of the word automatically, and asked did the court mean the couplers should couple automatically "without aid from any human?" and "does it also mean that it must couple automatically without having been touched by any human before?" The trial judge in complete abdication of his duty to instruct the jury on the law as interpreted by the Supreme Court of the United States merely reread the statute and said "Listen to the law. I think you will be able to interprete it if you listen to the law."

The jury later returned to inquire whether or not their verdict would find criminality. The Court again declined to give the jurors' a meaningful instruction.

The Court directed counsel to perform the function of educating the jury as to the law as well as convincing the jury as to the facts.

In view of the confusion in the Court below, resulting from the contentions of counsel as to the meaning of *Parker,* supra, this Court should clarify whether or not the failure of a coupler resulting from the normal operations of the railroad creates an exception to the absolute requirements of the Safety Appliance Act. *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54 (1943).

This court in *Bailey,* supra, held that the right to jury trial is "part and parcel" of the remedy afforded by the Federal Employer's Liability Act, which Act is read in pari materia with the Safety Appliance Act. A fair and meaningful trial by jury should include an instruction which informs the jury as to the provisions of the Safety Appliance Act as construed by the Supreme Court of the United States.

CONCLUSION

Under the foregoing authorities injured railroad employees are entitle to juries informed as to the protective provisions of the Safety Appliance Act, and to assure this, the Writ should issue.

Respectfully submitted,

By: _____

TOM B. STEWART, JR.
345 East Forsyth Street
Jacksonville, Florida 32202
Telephone No. 904-353-6473
Counsel of Record for Petitioner

WILLIAM D. BARFIELD
401 Florida Theatre Building
Jacksonville, Florida 32202
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Supreme Court have been furnished by United States first class mail on this_____day of_____1981, to the following:

E. DALE JOYNER, Esq.
Toole, Taylor, Moseley & Joyner
100 Barnett Bank Building
Jacksonville, Florida 32202
Attorney for Respondent

_____
Attorney

APPENDIX

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO
FILE REHEARING PETITION AND
DISPOSITION THEREOF IF FILED.

CASE NO. TT-101

McARTHUR DAVIS,
Appellant,

vs

FLORIDA COAST RAILWAY COMPANY,

Appellee.

Opinion filed December 30, 1980

An Appeal from the Circuit Court for Duval County,
Marion W. Gooding, Judge.

Tom B. Stewart, Jr., Jacksonville
for Appellant.

E. Dale Joyner of Toole, Taylor, Moseley &
Joyner, Jacksonville, for Appellee.

PER CURIAM.

AFFIRMED.

ROBERT SMITH AND THOMPSON, JJ., and
WOODIE A. LILES (Ret.)
Associate Judge, CONCUR.

B-1

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

Case No. 77-5977-CA

Division: D

McARTHUR DAVIS,

Plaintiff,

vs.

FLORIDA EAST COAST RAILWAY COMPANY,
a corporation,

Defendant.

COURT'S CHARGE ON SAFETY APPLIANCE ACT

The plaintiff, McARTHUR DAVIS, is seeking to recover money damages against the FLORIDA EAST COAST RAILWAY COMPANY for an injury he claims he received on August 18, 1976, while working as a switchman in Jacksonville, Florida.

Now, the issue for your determination in whether the defendant violated the standards of the Federal Safety Appliance Act, and, if so, whether such violation was the cause or contributing cause of the injuries the plaintiff claims he sustained.

The plaintiff charges that the defendant thereby was quilty of a violation of the Act of Congress of the United State known as the Federal Safety Appliance Act.

The relevant portion of the Act reads:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers automatically by impact..."

Defendant railroad admits the alleged railroad car, if involved, was hauled on its line and used in interstate commerce, but denies any violation of the Safety Appliance Act and any injury to plaintiff resulting from any alleged violation of the Act.

Now, a violaton of the Safety Appliance Act is a legal cause of injury if it produced or contributes, in whole or in part, to producing such injury.

If the greater weight of the evidence does not support the plaintiff's claim under the Safety Appliance Act, then he cannot recover against the Railroad under that theory. However, if the greater weight of the evidence shows the Railroad failed to comply with the Safety Applianc Act and that such failure was a legal cause, in whole or in part, of the plaintiff's injuries, then plaintiff is entitled to recover damages against the defendant.

Office-Supreme Court, U.S.
FILED
MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

80-1633

IN THE

Supreme Court of the United States

October Term, 1980

McArthur Davis,

Petitioner

vs.

Florida East Coast Railway Company,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

E. Dale Joyner
1000 Barnett Bank Building
Jacksonville, Florida 32202
Telephone No. 904-356-1306

Counsel of Record for Respondent

QUESTION PRESENTED FOR REVIEW

The Petitioner believes that a more accurate statement of the question presented for review is whether the trial court adequately instructed the jury based upon the law applicable to the facts of this case.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1, 2
SUMMARY OF ARGUMENT	3
ARGUMENT	3-13
CONCLUSION	14
CERTIFICATE OF SERVICE	15
APPENDIX	A-1-4

TABLE OF AUTHORITIES

PAGE

Affolder v. New York, C & St. L. R. Co.,
339 US 96 (1950) 4, 5, 6, 9, 10, 12, 13

Atlantic City R.R. Co. v. Parker,
242 US 56 (1916) 6, 10

Carter v. Atlanta & St. Andrews Bay Ry. Co.,
338 US 430 (1949) 4

Cobb v. Union Railway Co.,
318 F.2d 33 (1963) 9

Garrison v. Hertz Corp.,
129 So.2nd 452 (1961) 9

Kansas City Southern Railway Company v. Cagle,
229 F.2d 12 (1955) 11

McCalley v. Seaboard Coast Line Railroad Company,
252 So.2d 275 (1971) 9

McGowan v. Denver & R. G. W. R. Co.,
244 F.2d 628 (1952) 11, 12, 13

New York, C & St. L. R. Co. v. Affolder,
174 F.2d 486 (1949) 4

O'Donnell v. Elgin, Joliet & Eastern Railway Company,
338 US 384 (1949) 4

San Antonio Railway v. Wagner,
241 US 476 (1916) 7, 10

Sermans v. Pittman,
138 So.2nd 765 (1962) 9

TABLE OF AUTHORITIES (Continued)

PAGE

Smith v. Whidden,
87 So.2nd 42 (1956) 9

Williams v. Chrysler Motor Corporation,
270 So.2nd 403 (1972) 9

STATUTES

Federal Safety Appliance Act
45 USC §2 ..... 1, 2, 3, 4, 5, 14

IN THE

Supreme Court of the United States

October Term, 1980

McArthur Davis,
Petitioner
vs.
Florida East Coast Railway Company,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case but believes certain amplification is necessary and adds that herein.

Petitioner filed this suit based upon charges of negligence and accordingly a violation of 45 USC §51, as well as violation of 45 USC §2 (commonly called the Safety Appliance Act). Subsequently the charges of negligence were dropped and the Plaintiff proceeded to trial solely on the basis of whether there was a violation of 45 USC §2, which pertains to the type of couplers to be provided by a common carrier on cars used on its railroad. Petitioner did, however, produce evidence in its case in chief regarding the reasons for a coupler to be hard to move when it is pushed to one side or the other of the center of the car. It was the contention here that the coupler could be hard to move due to a faulty slide plate.

In the trial, all witnesses agreed that side play is necessary for the operation of railroads. It was further undisputed that couplers can be misaligned to the point that they cannot be coupled and this is not indicative of a defect with the coupler or the drawhead to which it is attached. As indicated in Petitioner's statement of the case, couplers can be moved off center due to being uncoupled on a curve or due to two couplers coming together where the knuckles are closed and thereby pushing the drawhead and coupler off to the side. Again, a coupler can be in working condition and, in fact, good condition and still be too far off to one side to allow coupling due to the existence of side play or lateral movement. In this particular case, the Plaintiff saw nothing defective with the coupler, the drawhead or the knuckle and no evidence was produced at trial to show that the coupler, drawhead or knuckle were in fact defective.

The trial court, after receiving requested jury instructions from Petitioner and Respondent, charged the jury by reading the applicable portions of the statute involved, 45 USC §2. (See full jury charge in Appendix). Upon return of a verdict in favor of Respondent and entry of a Final Judgment in favor of same, Petitioner appealed to the Florida First District Court of Appeal. Thereafter, on December 30, 1980, that court entered, without opinion, a per curiam affirmance of the trial court's entry of Final Judgment.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

SUMMARY OF ARGUMENT

From reading the decisions of this Court, it is apparent that in fact the jury charge, as given by the trial court, was proper in that it left for the jury to determine whether or not the existence of side play in the coupler and drawhead involved would be in compliance with 45 USC §2 or not. In other words, it was for the jury to determine if the side play as existing complied with the Safety Appliance Act.

In view of the fact that no written opinion was rendered by the Florida First District Court of Appeal, it is not known upon what grounds the trial court's entry of Final Judgment was affirmed. There are, however, alternative grounds from those stated by Petitioner. The appellate court below could have found that the requested jury instructions, as presented by the Petitioner, were erroneous and not necessary and which is sufficient basis to sustain the trial court's decision.

No conflict exists between the decision of the Florida First District Court of Appeal and decisions of this Court, a federal court of appeals or other state courts of last resort. The cases cited by Petitioner are factually distinguishable and different issues were before the appellate court in those cases.

ARGUMENT

A. DECISION OF STATE APPELLATE COURT AFFIRMING THE RULINGS OF TRIAL COURT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT. IN FACT THE DECISION IS SUPPORTED BY THIS COURT'S OPINIONS.

1. No conflict with decisions of this Court.

Petitioner maintains the decision of the First District is in conflict with opinions of this Court, specifically the decisions of *O'Donnell vs. Elgin, Joliet & Eastern Railway Company,* 338 US 384 (1949), *Carter v. Atlanta & St. Andrews Bay Ry. Co.,* 338 US 430 (1949), and *Affolder v. New York, C. & St. L. R. Co.,* 339 US 96 (1950). Review of these cases shows that there is no conflict.

The *O'Donnell* case involved the death of a railroad employee due to being struck by cars that broke loose because a coupler broke. After the cars had come loose, they began to roll and thereafter struck the decedent. It was clear that the Plaintiff's case had been based upon the contention that the death arose as the result of the breaking of coupler. This court in an opinion written by Justice Jackson held that the Safety Appliance Act, 45 USC §2, would be violated by a coupler which broke and set cars free during a switching operation. The Court further ruled that it was not a question of negligence on the part of the defendant railroad with regard to its diligence and care to provide couplers that would not break. The issue was only to determine if the coupler had broken during a switching operation and if so, then that alone was sufficient to support a violation of the Safety Appliance Act.

Nothing in this Court's opinion in the *O'Donnell* case is in conflict with the case at bar. The issue was not one of a coupler breaking; there was no question of proving negligence.

The *Carter* decision of this Court is likewise not in conflict in that the facts and issues of law were different from those being considered at present. In that case one issue was whether the fact that the coupler had worked properly before and after the accident would be sufficient to take the case from the jury and allow the court to enter a verdict in favor of the defendant on the basis that no violation of the Safety Appliance Act had been proven. This Court held that

the question for the jury was whether the coupler worked properly at the time in issue and not whether it worked properly before or after. In so holding, it was stated that negligence was not an element that must be proven in order to show a violation of the Safety Appliance Act. That is the sum and substance of the opinion, insofar as it could in any way be related to this case.

In the case at bar, the trial court did not instruct the jury that negligence must be proven, nor were there any instructions given regarding the functioning of this coupler before or after the incident in which the Plaintiff was injured.

The *Affolder* decision is clearly not in conflict and in fact supports the trial court's action below. In *Affolder,* the trial court instructed the jury in the language of 45 US §2 and left it up to the jury to decide if in fact the defendant railroad had violated the Safety Appliance Act by using cars not equipped with couplers coupling automatically by impact. The jury found for the plaintiff and in the course of rendering its verdict found that the defendant had in fact violated the Safety Appliance Act. The Eighth Circuit Court of Appeals reversed the trial court and this Court granted certiorari. The charge to the jury is contained in the opinion of the Eighth Circuit found at 174 F.2d 486 (8th Cir. 1949).

In reviewing the trial court's instruction, Justice Clark found that it was adequate and specifically that there was no need to explain to the jury that the couplers, or at least one of them, had to be opened prior to impact in order to find a violation of the Act. Justice Clark wrote that this issue was one that was properly left to counsel to argue and that the charge was sufficient to inform the jury of the relevant law.

Likewise, in the case at bar, the court instructed in the language of the statute and left it to the jury to determine if in fact the statute had been complied with or violated based upon the evidence presented. This is exactly what the *Affolder* decision stands for. It should be noted, also, that

Affolder does hold that couplers must be positioned properly in order to function and if they are not so positioned and then do not couple upon impact, there will not be a violation of the Act. This is significant in that it establishes that certain conditions must be met in order for a coupler to function. The Petitioner's requested instruction number 5 did not recognize that these conditions must be met and is therefore contrary to *Affolder.*

Again, there is no conflict between the decision below and the holdings of this Court.

2. Decision by state appellate court supported by this Court's opinions.

Not only is there no conflict between the decision of this Court and that of the state appellate court, but review of the applicable cases show that this Court's opinions support the decisions of the state appellate court and trial court. The key fact here is that this Court has established that it is the function of the jury to determine if the Safety Appliance Act is violated and that it is the jury's province to apply the statute to the evidence as presented to it. More specifically, this Court has left to the jury the question of determining whether or not the Safety Appliance Act is violated due to side play in couplers and drawheads.

In that regard, this Court has recognized the existence and necessity of side play in couplers and drawheads to which the coupler is attached. In *Atlantic City R. R. Co. v. Parker,* 242 U.S. 56 (1916), 37 S.Ct. 69, 61 L.Ed. 150, Justice Holmes was considering whether or not the trial court had properly let a case go to a jury when the case involved the question of aligning a coupler by moving the drawhead. It was concluded that, in fact, a question for the jury had been raised and that the court was correct in allowing a jury to decide it. In so ruling, this Court noted that side play must be allowed in drawheads and that

whether the side play is too great or not, is for the jury to determine from the facts. Justice Holmes wrote:

> Some lateral play must be allowed to drawheads and further, the car was on a curve, which, of course, would tend to throw the coupler out of line. But a jury were warranted in finding that the curve was so slight as not to affect the case and then regarding the track as for this purpose, a straight line. If couplers failed to couple automatically upon the straight track, it at least may be said that a jury would be warranted in finding that a lateral play so great as to prevent coupling is not needed, and that, in the absence of any explanation believed by them, the failure indicated that the Railroad did not fully comply with the law. 242 U.S. at 59.

Clearly then, this Court here held that it is for the jury to determine whether or not a particular coupler complies with the Safety Appliance Act from the evidence presented to it. It is also equally clear that side play in and of itself which may require adjustment of the coupler, does not necessarily constitute a violation of the Act as Petitioner claims and that it is up to the jury to make this determination.

The question of whether side play or lateral movement in a coupler would be so excessive as to violate the Safety Appliance Act was again held by this Court to be an issue for the jury in *San Antonio Railway v. Wagner*, 241 U.S. 476, 36 S.Ct. 626, 60 L.Ed. 1110. There, Justice Pitney held that this was a question for the jury when he stated:

> The jury could reasonably find that the misalignment of the drawhead was greater than required to permit the rounding of curves, or, if not, then an adjusting lever should have been provided upon the engine as upon the car, and that there was none upon the engine. 241 U.S. at 484.

A reading of these opinions can only lead to the conclusion that the trial court correctly charged the jury in the statutory language and then left it up to the jury to determine if the Act had been violated by the presence of side play. Certainly under no circumstances can Petitioner support his contention that this Court has not made it clear that the question of side play and whether it was excessive or not is one for the jury to determine in order to see if the Safety Appliance Act was violated.

B. THE FIRST DISTRICT COURT OF APPEAL DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner maintains that the per curiam decision, without a written opinion by the District Court of Appeal, First District, State of Florida, in fact did decide an important question of Federal law which has not been settled by this Court and therefore the Court should review this matter on that basis. That contention is not evident from the record since there is no written opinion establishing why the First District Court of Appeal affirmed the trial court. All that the First Dirstrict Court of Appeal did was to allow to stand the decision of the trial court to instruct the jury in the language of the statute and then submit the question of whether or not the Act was violated to the jury for its consideration. There are numerous reasons why the First District Court of Appeal could have done this.

First, the Petitioner's requested instructions numbered 1, 3 and 5, as set forth in pages five and six of his Petition, were, in the case of instruction number 1, an introductory instruction that was discretionary with the trial court; in case of requested instruction number 3, one that did not cover the issues presented by the evidence; and in the case of requested instructions numbered 3 and 5, ones that were not correct statements of the law in the form presented by the Petitioner.

It should be noted that requested instruction number 3 sought to have the jury instructed that a showing of diligence and due care could not excuse the Defendant Railroad from being found to have violated the Safety Appliance Act. This was never pleaded in this cause nor was any evidence adduced to show that the railroad has used due diligence to provide a coupler that functioned properly. In Florida, as is the case in all courts of our country, a trial court correctly denies instructions that have no basis in the evidence and that contain issues not raised by the evidence or covered by the pleadings. *Sermans v. Pittman,* 138 So.2nd 765 (1st D.C.A.,1962); *Smith v.Whidden,* 87 So.2nd 42 (Fla., 1956); *Garrison v. Hertz Corp.,* 129 So.2nd 452 (3rd D.C.A., 1961).

Instruction number 3 also contains an incorrect statement of the law in that it sought to have the jury instructed that it was the duty of the Defendant to keep couplers in such a condition that "they will perform their functions at all times". This is simply not the law since there are exceptions recognized to the requirement that couplers couple automatically by impact and uncouple automatically. *Affolder v. New York, C. & St. L. R. Co.,* 339 US 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950), *McCalley v. Seaboard Coast Line Railroad Company,* 252 So.2d 275 (4th DCA, 1971). The court is, of course, not under a duty to give an instruction which contains an incorrect statement of the law. *Williams v. Chrysler Motor Corporation,* 270 So.2d 403 (3d DCA, 1972); *Cobb v. Union Railway Co.,* 318 F.2d 33 (6th Cir., 1963).

Petitioner's requested instruction number 5 also misstated the law in that it would require a jury to find a violation of the Safety Appliance Act if "it was necessary for Plaintiff to manually adjust the drawbar or a coupling mechanism in order to make the couplers couple automatically by impact". This, of course, is not the law and the trial court and Florida First District Court of Appeal correctly rejected that instruction on that basis alone. The inherent design of the coupler

is such that certain conditions must be met before the coupler will couple upon impact or can be uncoupled. Again, it is to this extent that there are exceptions and this Court has, in fact, recognized this fact in the *Affolder* decision, *supra*. There it was held that a finding that the Safety Appliance Act is violated where there is evidence of failure to couple:

> Assumes that the coupler was placed in a position to operate on impact. Thus, if "the failure of these two cars to couple on impact was because the coupler on the Pennsylvania car had not been properly opened", the Railroad had a good defense. 339 U.S. at 99.

Later in this same opinion this Court reaffirmed that the couplers must be open. And as footnote four of the opinion shows, a coupler is open if the knuckle is open. Justice Jackson in his dissent, noted that the Supreme Court recognized that "before a failure to couple establishes a defective coupler, it must be found that it was properly set so that it could couple. If it was not adjusted as such automatic couplers must be, of course, the failure is not that of the device." *Supra*, 339 U.S. at 101, 94 L.Ed. at 689. Clearly then, there will be no violation of the Safety Appliance Act if couplers fail to couple upon impact due to the failure to open a knuckle.

Again, the District Court of Appeal may very well have affirmed the trial court on the basis that the instructions that the Petitioner sought to have the court give were not necessary in the case of instruction numbers 1 and 3 and were incorrect statements of law in the case of instruction numbers 3 and 5.

Obviously, the state appellate court could very well have followed this Court's holdings in *Atlantic City R.R. Co. v. Parker, supra,* and *San Antonio Railway v. Wagner, supra.* We submit that based upon those opinions there was ample

guidance for the appellate court to affirm the decision of the trial court to let the jury decide whether the amount of side play present was in conformity with the Safety Appliance Act by instructing in terms of the statute itself.

C. NO CONFLICT WITH A FEDERAL COURT OF APPEALS OR OTHER STATE COURTS OF LAST RESORT.

Petitioner alleges that the decision rendered herein by the First District Court of Appeal represents a conflict with the United States Court of Appeals, Tenth Circuit, in its opinion of *Kansas City Southern Railway Company v. Cagle,* 229 F2nd 12 (10th Cir. 1955) and the Supreme Court of Utah in *McGowan v. Denver & R. G. W. R. Co.,* 244 F2nd 628 (Utah 1952). We again submit first that there is no way to determine if there is a conflict since the Florida First District Court of Appeal did not render an opinion and that there were alternative grounds upon which the court could affirm other than ruling that a drawbar or railroad car that is so far out of line as to prevent automatic coupling does not violate the Safety Appliance Act. As described previously, there are other grounds upon which the First District could have based its decision. Even if it is assumed, however, that the First District Court of Appeal did determine that a coupler misaligned so far as to prevent coupling is not necessarily a violation of the Safety Appliance Act, we submit that the *Cagle* and *McGowan* cases, *supra,* are distinguishable.

With respect to the *Cagle* opinion, the Petitioner maintains there is a direct conflict between that decision and the case at bar. In fact, there are substantial differences in those two cases which distinguish them. First, in the case before the Court here, there was no ruling by the trial court nor any decision recorded by the Florida First District Court of Appeal to the effect that misalignment of a coupler will not be a violation of the Safety Appliance Act. All that the trial court did was read the statute and then let the jury make the decision as to whether the coupling mechanism involved

was in complance with the Safety Appliance Act. The trial Court recognized that it was a jury question and submitted it to the jury. In the *Cagle* case there was before the court a question of whether there was sufficiency of evidence to support the judgment and it was not a case of specific jury instructions or the propriety of charging the jury in accordance with statutory language. The Tenth Circuit ruled that there was in fact sufficient evidence to support a verdict for the Plaintiff based upon its finding that there was evidence to show that the coupler was misaligned.

In the case presently before the Court there is an issue of whether the jury was properly instructed. On the other hand, the *Cagle* opinion again involved the issue of whether there was sufficient evidence to support the verdict and whether drawbar alignment was an issue for the jury to consider in order to determine if there was a violation of the Safety Appliance Act.

The *McGowan* case held that a Plaintiff does not have to show a defective or bad condition of a coupler but simply that it did not work. Along the same line, the court noted that negligence need not be proved. Again, the trial court below did not make any ruling contrary to this proposition.

The Utah Supreme Court in *McGowen* did, in considering the instructions given to the jury, hold that an instruction to the effect that adjusting the coupling mechanism in order to couple cars would violate the Safety Appliance Act was in error and cited *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950). In the *Affolder* decision, this Court recognized that there are certain conditions that must be met with regard to the coupler before it can function. Specifically, it was held therein that if at least one knuckle is not open on a coupler it cannot possibly couple and there would be no violation of the Act for failure to do so.

Reviewing the opinion in the *McGowen* case and specifically reading Plaintiff's instruction number 5 at page 631 of the opinion shows that it is essentially the same as Petitioner's requested instruction number 5. The Supreme Court of Utah found this instruction to be improper in light of *Affolder* but did not grant the Defendant relief because of the failure to object properly. It is clear that *McGowen* does not support the Plaintiff's claim that it's requested instruction should be given. Moreover, as stated above, the Utah Supreme Court specifically found that it would be improper to instruct a jury that any manual adjustment would violate the Safety Appliance Act. Additionally, *McGowen* was concerned about the fact that the Petitioner would have to go between the cars, and the Petitioner's requested instructions would require the jury to find a violation of the Safety Appliance Act for any adjustment whatsoever to the coupler regardless of the location of the individual making the adjustment and this is clearly not the law and not the holding of *McGowen*.

It is clear that the *Cagle* and *McGowen* cases are distinguishable and cannot be relied upon by the Petitioner to show a conflict if it is assumed that the appellate court below ruled as claimed. Moreover, these cases do not support the Petitioner's requested jury instructions.

CONCLUSION

The decision of the Florida Appellate Court, upholding the trial court, without an opinion, should not be reviewed by this Court. There is no conflict between decisions of this Court, federal courts of appeal or other state courts. The decision of the state court did not decide an important issue of federal law and there are absolutely no special or important reasons of granting Petitioner's request for a writ of certiorari. On the contrary, the decisions below are in accordance with this Court's construction of 45 USC §2 in that the jury was fully and adequately charged on the controlling law and then given the opportunity to make its decision as to whether or not the Safety Appliance Act had been violated. With the jury being properly charged on the law, its decision should stand.

TOOLE, TAYLOR, MOSELEY & JOYNER

BY: _____

E. DALE JOYNER
1000 Barnett Bank Building
Jacksonville, Florida 32202
(904) 356-1306
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of , 1981, three copies of the foregoing Response To Petition For Writ Of Certiorari have been furnished by United States mail, first class, postage prepaid, to the following:

TOM B. STEWART, JR., *Esquire*
345 East Forsyth Street
Jacksonville, Florida 32202

WILLIAM D. BARFIELD, *Esquire*
401 Florida Theatre Building
Jacksonville, Florida 32202

_____
ATTORNEY

APPENDIX

JURY CHARGE

THE COURT: Ladies and gentlemen of the jury:

I shall now instruct you on the law that you must follow in reaching your verdict.

It is your duty as jurors to consider and weigh the evidence, to decide the disputed issues of fact and to apply the law to the facts as you find them from the evidence.

Your verdict must be based on the evidence that has been received and the law on which I am now instructing you. In reaching your verdict, you are not to be swayed from the performance of your duty by prejudice, sympathy, or any other sentiment for or against any party.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest, if any, in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified and the reasonableness of his testimony considered in light of all the evidence in the case and in the light of your own experience and common sense.

The Plaintiff, McARTHUR DAVIS, is seeking to recover money damages against the FLORIDA EAST COAST RAILWAY COMPANY for an injury he claims he received on August 18, 1976, while working as a switchman in Jacksonville, Florida.

Now, the issue for your determination is whether the Defendant violated the standards of the Federal Safety Appliance Act, and, if so, whether such violation was the cause or contributing cause of the injuries the Plaintiff claims he sustained.

The Plaintiff charges that the Defendant thereby was

guilty of a violation of the Act of Congress of the United States known as the Federal Safety Appliance Act.

The relevant portion of the Act reads:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact" –

Defendant railroad admits the alleged railroad car, if involved, was hauled on its line and used in interstate commerce, but denies any violation of the Safety Appliance Act and any injury to Plaintiff resulting from any alleged violation of the Act.

Now, a violation of the Safety Appliance Act is a legal cause of injury if it produced or contributes, in whole or in part, to producing such injury.

If the greater weight of the evidence does not support the Plaintiff's claim under the Safety Appliance Act, then he cannot recover against the Railroad under that theory. However, if the greater weight of the evidence shows the Railroad failed to comply with the Safety Appliance Act and that such failure was a legal cause, in whole or in part, of the Plaintiff's injuries, then Plaintiff is entitled to recovery damages against the Defendant.

Now, the greater weight of the evidence means the more persuasive and convincing force and effect of the entire evidence in the case.

If you find for the Defendant, you will not consider the matter of damages. But if the evidence proves that the Defendant violated the Safety Appliance Act and that the violation was a legal cause of loss, injury or damage to Plaintiff, you should award Plaintiff an amount of money that the greater weight of evidence shows will fairly and

adequately compensate him for such loss, injury or damage including such damage as Plaintiff is reasonably certain to incur or experience in the future. You shall take into consideration the following elements:

1. Any bodily injury sustained by the Plaintiff and any resulting pain and suffering, disability, mental anguish and loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future. There is no exact standard for fixing the compensation to be awarded on account of such elements of damages. Any such award should be fair and just in the light of the evidence.

Secondly, consider any earnings lost in the past and any loss of ability to earn money in the future.

If the greater weight of the evidence shows that the Plaintiff has been permanently injured, you may consider life expectancy. The mortality tables received in evidence may be considered in determining how long he may be expected to live. Such tables are not binding upon you, but may be considered together with other evidence in the case bearing on the Plaintiff's health, age, and physical condition before and after the injury in determing the probably length of his life.

Any amounts which you allow in damages for future loss of ability to earn money in the future should be reduced to the recent money value, and only the present money value of such amounts should be included in your verdict.

An injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as can reasonably be done. He may recover damages for lost earnings, and for the loss of the ability to earn money in the future, but is precluded

from the recovery to the extent that he could have earned wages in the past and to the extent that he has the ability to earn money in the future.

In considering mitigation of the damages, the rule is that one will be required to submit to an operation only when a reasonably prudent man under the circumstances would do so.

(Note: The remainder of the jury instruction dealt with the verdict forms.)